(5) (4)

Nos. 88-1671 and 88-1688

Supreme Court, U.S.
FILED
NOV 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

GEORGE R. TRIPLETT, *et al.*

COMMITTEE ON LEGAL ETHICS OF THE
WEST VIRGINIA STATE BAR,
Petitioner

v.

GEORGE R. TRIPLETT, *et al.*

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF FOR THE PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 pp

QUESTION PRESENTED

Whether the attorney's fees provisions of the Black Lung Benefits Act, as applied, violate the Due Process Clause of the Fifth Amendment by denying claimants access to counsel.

PARTIES TO THE PROCEEDING

The petitioner in No. 88-1671 is the United States Department of Labor, intervenor below. The petitioner in No. 88-1688 is the Committee on Legal Ethics of The West Virginia State Bar, the petitioner below. George R. Triplett, the respondent below, is the respondent in this Court.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Appeals is reported at 378 S.E.2d 82. The Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline of the Committee on Legal Ethics of The West Virginia

State Bar (Pet. App., No. 1671, 42a-51a), are unreported.[1]

JURISDICTION

The judgment of the Supreme Court of Appeals was entered October 26, 1988 (Pet. App., No. 1671, 1a-30a). A petition for rehearing was denied on December 21, 1988 (Pet. App., No. 1671, 52a). On March 14, 1989, Chief Justice Rehnquist extended the time for filing a petition for a Writ of Certiorari to and including April 20, 1989. On April 18, 1989, the Petition for Writ of Certiorari was filed. By Order dated October 2, 1989, this Court granted the Petition pursuant to 28 U.S.C. Section 1254(1). This case, by the same order, was consolidated with *United States Department of Labor v. George R. Triplett, et al.*, No. 88-1671.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a) (1982 & Supp. V 1987), incorporating various provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), and Section 28 of the LHWCA (33 U.S.C. 928 (1982 & Supp. V 1987)), which is one of the provisions so incorporated, are set forth in the Pet. App., No. 1671, 53a-56a.

The Department of Labor's regulations governing the payment of claimants' attorney's fees in black lung cases, 20 C.F.R. 725.365-725.367, are set forth in the Pet. App., No. 1671, 52a-60a.

STATEMENT

In this case the Supreme Court of Appeals of West Virginia determined that the system for awarding attorney's fees in black lung cases violated the Due Process Clause of the Fifth Amendment by denying claimants

[1] The Petitioner relies upon the Petitioner's Appendix, No. 1671 already filed in this matter.

access to counsel. The court concluded that the attorney's fee system produces undue delays in payment and provides inadequate compensation, thereby discouraging most attorneys in West Virginia from representing claimants for black lung benefits. The court thus held that, as applied, the attorney's fee provisions are unconstitutional, and, consequently, the violation of those provisions cannot serve as the basis for attorney discipline proceedings.

Petitioner originally charged Respondent Triplett with misrepresentation to the Department of Labor regarding his intentions to collect a fee. For this reason, charges were laid under West Virginia Disciplinary Rule 1-102 (a)(4)(5) and (6), alleging professional misconduct reflecting upon Respondent Triplett's fitness to practice law. The West Virginia Supreme Court of Appeals found that Respondent Triplett's misconduct was "his knowing violation of the DOL regulations, not his alleged misrepresentation to the DOL regarding his intention to collect a fee." The West Virginia Supreme Court pointedly added that had Petitioner found Respondent ". . . lied to the DOL, such a finding would not have been supported by the record." (Pet. App., No. 1671, 6a).

Petitioner further adopts the Statement of the Case prepared and filed by the United States Department of Labor.

SUMMARY OF ARGUMENT

The federal black lung fee system, as applied, does not violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Invalidation would frustrate the federal purpose of protecting claimants against improvident contracts, and would expose the Black Lung Disability Trust Fund to greater liability. Additionally, there has not been an extraordinarily strong showing of probability of error in the current Department of Labor fee system to warrant the finding below that the system violates the Due Process Clause of the Fifth Amendment of the Constitution.

ARGUMENT

I. INVALIDATION WOULD FRUSTRATE THE FEDERAL PURPOSE OF PROTECTING CLAIMANTS IMPROVIDENT CONTRACTS AND WOULD EXPOSE THE BLACK LUNG DISABILITY TRUST FUND TO GREATER LIABILITY.

As shown in this case on its merits, claimants were forced to pay Black Lung fees without the benefit of having them properly approved. A review of the rules and the history of the Department of Labor in administering the program shows a clear purpose to protect claimants against improvident contracts.

Evidence in the record below makes clear the necessity for protection. For example, in one incident, where Respondent ultimately did file a petition, the fee petition claimed 42 hours, and Respondent Triplett could only substantiate 22 hours. The Department only approved payment for 27 hours. Likewise, Administrative Judge Warsaw deleted 6 hours from Respondent's fee petition because 4 hours were not sufficiently itemized and 2 were spent preparing the fee petitions. He also reduced Respondent's hourly rate. [Respondent's Hearing Exhibit 14].

Respondent Triplett complained that the fee petition process was time-consuming and frustrating. His claim was apparently successful in changing the focus of the court below from scrutinizing Respondent Triplett's actions to scrutinizing the Black Lung process. The State Bar showed that Respondent's conduct was prejudicial to the administration of justice. Congress and the Department of Labor have determined that claimants, who may receive a large lump sum of money, need protection from their attorneys or lay representatives with respect to fees. But the protection depends in large part upon the honesty and trustworthiness of the attorneys. Claimants rarely complain because they receive at least some money. They

most often do not understand the fee provisions anyway, as was demonstrated by every client witness who testified at the hearing. When attorneys ignore important regulations and misrepresent facts to those who administer the program, the system of justice is prejudiced and protections are needed.

It is further submitted that Respondent, as an officer of the Court, had other, more ethical ways to challenge the Black Lung Fee system, which would have allowed for the protection of the public.[2] Respondent Triplett's complaints are no excuse for breaking the law. "While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process." [3]

II. THERE HAS BEEN NO EXTRAORDINARILY STRONG SHOWING OF PROBABILITY OF ERROR IN FEDERAL BLACK LUNG PROCEDURE.

This Court in *Walters v. National Association of Radiation Survivors, et al.*, 473 U.S. 305 (1985), which case provided the basis for the opinion below, stated "[i]t would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." Such a rule should apply in this case as well.

The issue of the constitutionality of the Black Lung regulations was neither briefed, argued or raised by the parties below. Based upon what might be labeled as "anecedotal evidence", the Court below reached its decision on the basis of an amicus brief with several affida-

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[2] This is especially true since the moneys concerned had been put into escrow.

[3] Preamble, West Virginia Rules of Professional Conduct, Court Rules Volume, The West Virginia Code.

vits. Justice Miller, writing in dissent for himself and Justice McHugh, stated, "The ex parte affidavits filed as attachments to the amicus brief . . . are, to my mind, *woefully inadequate* to predicate the factual conclusion reached by the majority." (underlying applied) He goes on to note that there was not such an "extraordinarily strong showing" as to warrant the majority decision.[4] He concludes by stating:

> "Finally, there appears to me to be a lamentable lack of due process extended to the Department of Labor, which now finds its attorney's fee mechanism declared unconstitutional without ever having the opportunity to be heard before this Court announced its decision."

The Committee on Legal Ethics has an interest in enforcing valid disciplinary regulations that prohibit the violation of Department of Labor fee regulations. Additionally, while never briefed, argued or discussed below, the Committee has an interest in determining whether a lawyer can ethically enter into a contingent fee contract in an area governed by a valid fee shifting statute or regulation.[5]

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[4] He also notes the affidavits go to problems caused by the delay in receiving approved fees, not the amount of the fees.

[5] This problem was broadly discussed in Footnote 8 of *Committee on Legal Ethics v. Tatterson*, 352 S.E.2d 107 (W.Va. 1986). Various jurisdictions have taken conflicting positions on this matter. Contrast *Wheatley v. Ford*, 679 F.2d 1037 (CA 2, 1982) wherein the court held a contingent fee award must be deemed satisfied to the extent counsel receives the statutory award with *Sullivan v. Crown Paper Board Company*, 719 F.2d 667 (CA 3, 1983) holding counsel should receive contingent or statutory amount, whichever is greater. A variation of this is currently before the Court in *Venegas v. Mitchell*, No. 88-1725, Cert. granted (Oct. 2, 1989).

In short, the record below is grossly inadequate to make the showing *Walters*[6] requires to support its holding in this case.

III. PETITIONER FURTHER ADOPTS THE ARGUMENTS PREPARED AND FILED BY THE UNITED STATES DEPARTMENT OF LABOR.

CONCLUSION

The decision of the West Virginia Supreme Court of Appeals should be reversed, and this case remanded for further proceedings.

Respectfully submitted,

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[6] *Walters v. National Association of Radiation Survivors, et al.*, 473 U.S. 305 (1985).